No. 5708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGIA CASUALTY COMPANY (a corporation),
Appellant,

vs.

LAURETT BOYD,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable William B. Gilbert, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully asks a rehearing in this cause for the reason that appellee sincerely believes that this Court, in its judgment has failed to apply certain fundamental legal principles and as a result thereof, has rendered a decision, which if not corrected, will result in the gravest injustice.

Appellee is inclined to believe that this Court understood the exact situation as it existed between the doctor, the insurance company and herself, yet, certain passages in the decision of the Court raise a doubt in appellee's mind.

There is no doubt that Dr. Jarvis had the policy of insurance issued to him in May, 1925, containing that certain provision required in such contract by virtue of Statutes 1919, page 776; that said policy was issued to the doctor only upon certain warranties or representations. That thereafter, while this policy was in the possession of the doctor, the premium in the hands of the insurance company, and from all that appears while each of said parties held the same in full force and effect, the doctor operates on appellee and injures her. Now appellee gets after the doctor; the insurance company does a little investigating and soon the doctor receives a notice of rescission, advising him that the company has discovered the falsity of one of his warranties or representations, and on that ground it was rescinding the policy and returning the premium. That which we would especially point out is that no notice of this rescission is sent to appellee. She is completely ignored as well as ignorant of the rescission. Then, as we know, appellee sued and recovered a judgment against the doctor and he chose to become a bankrupt; the appellee then demanded that the insurance company pay the judgment obtained against its insured and was told that they denied all liability and the foregoing rescission was explained as the ground, even as it was later the defense in the cause which was brought under the provisions of the statute and which is now before this Court on appeal.

The basis of this decision, as we view it, is contained in the statement by the Court that:

> "The evidence is without conflict and fully supports the appellant's affirmative defense" (Opinion, p. 3, line 4).

We cannot agree to this statement in view of the fact that there is found in this case certain testimony that raises the question of notice and waiver by the insurance company. Dr. Jarvis, while testifying on behalf of the insurance company said that while he was insured with the Georgia Casualty Company, their agent recommended that he settle the claim, now being used as a defense and that said agent stated that it was no claim against the doctor, anyway, in the sense that it was caused by any negligent conduct on his part. Of course, this is denied by Mr. Williams, who was also called as a witness by the insurance company, and who claims that he at no time represented the Georgia Casualty Company (Tran. pp. 44 and 45). This is clearly a conflict of evidence on the appellant's side of the case and we most earnestly urge, that inasmuch as there were no findings of fact other than those which may be implied by reason of the judgment for appellee this Court is exceeding its province when it chooses to adopt certain evidence and ignore other testimony equally as credible. We, again, say to this Court that without the findings of the trial Court, especially in this case, the motion for judgment raised no question which this Court could review, and that the Court erred when it departed from the rule, that every intendment in favor of the validity of the judgment of the trial Court is to be exercised by the Appellate Court. Further, since there are no findings of fact, we do not feel the Court

has acted within its jurisdiction when it undertakes to say what the trial Court did or did not believe from the evidence as adduced before it.

Whether or not the insurance company had the right to rescind as against Dr. Jarvis, the appellee is not concerned. The appellee claims that under the policy of insurance she had certain contract rights, that were valid and enforceable and that if there were any defense to her action, the proper steps were not taken by the insurance company to preserve it.

In its discussion of appellee's rights under the policy of insurance, the Court has refused to consider appellee's authorities on the ground they were not in point and has failed to apply those rules applicable to contracts which are voidable as distinguished from those which are void.

Regardless of what else the case of *Malmgren v. S. W. etc. Insurance Company,* 201 Cal. 29, may decide, it does declare that insurance policies, which by virtue of the California Statute must incorporate its provisions, are tri-party contracts, consisting of the insured, the insurer, and the prospective injured party. That holding is no mere dictum and is binding upon this Court in applying the statute. Further, appellee referred to said case only for its authority upon that point.

Contrary to the opinion of the Court, we believe that the contract of insurance between the doctor and the insurance company was a valid contract of insurance; and that it was not void. It was the usual policy written in such cases, subject to the one in-

firmity, if we assume the truth of the insurance company's defense, that it was induced to enter into the contract by reason of the doctor's fraud. This most certainly did not invalidate the contract, it did make the contract *voidable*, as distinguished from void, and until such time as the insurance company acted upon its rights, it was a perfectly valid and subsisting contract (6 Cal. Jur. 28, par. 12). Meantime, between the making of the contract and before the rescission, appellee had been injured and her rights under the contract had accrued. She was an innocent party, untouched by the doctor's fraud and it cannot be raised against her.

The rule as to voidable contracts when the rights of innocent third parties intervene is to prevent the rescission and leave the original parties to the contract subject to the remedy of damages as between themselves.

There is an expression in the opinion that appellee furnished no consideration, and our reaction is that this prejudiced the cause of appellee. Of course, this should not be so, for the rule in this jurisdiction, as in the majority of jurisdictions is:

> " * * * that a third person may enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. In other words, it is not necessary that any consideration move from the third party; it is enough if there is a sufficient consideration between the parties who make the agreement for the benefit of the third party. This doctrine, originally an exception to the rule that no claim can be sued upon contractually unless it is a contract between the parties to the suit, has become

> so general and far reaching in its consequences as to have ceased to be simply an exception, but is recognized, within certain limitations, as an affirmative rule."
>
> 6 *R. C. L.* 884;
>
> *Buckley v. Gray,* 110 Cal. 339, 42 Pac. 900.

If what we have said is true, then we feel that appellee comes within that portion of the opinion that reads as follows:

> "It may be conceded that after an injury has been suffered, neither by agreement nor otherwise, could the parties to the policy deprive the injured person of the benefit thereof, but as already suggested, the right of the third person presupposes the existence of a *valid* policy." (Page 5, lines 9-13.)

In referring to appellee's authorities, the opinion of this Court states

> "But admittedly, no decided case is directly in point, and hence, we do not stop to analyze or distinguish the citations."

True, there is no case cited on all fours with the present case, however, each of said cases presents a similar situation and we feel that the reasoning therein, carried to its logical conclusion, is that which should be applied to this cause.

It is our belief that the principles and rules gleaned from a study of those cases, create a mathematical reasoning from which the appellee's right to recover is inescapable.

We submit that the conclusion of this Court, if not rectified, will vitiate the very purposes of the California statute. The primary and only object of this

statute is the protection of the injured party. Its purpose is to prevent and remedy certain evils that once prevailed in the insurance business. If the injured person is to be denied a recovery on the state of facts we have here what is to prevent practices along this line? A very simple method is presented the unscrupulous by which the statute may be evaded under the restricted effect given it by this decision.

Dated, San Francisco,
August 28, 1929.

Respectfully submitted,

HARRY I. STAFFORD,
DEAN CUNHA,
Attorneys for Appellee and Petitioner.

DANIEL R. SHOEMAKER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 28, 1929.

HARRY I. STAFFORD,
Of Counsel for Appellee and Petitioner.